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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002183-MR

CARLA LEANN KEDING — APPELLANT

v. — APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 09-CI-00425

DAVID JAMES KEDING — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, STUMBO, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Carla Leann Keding appeals from the trial court's judgment and order of September 8, 2011, and the docket order entered November 8, 2011, whereby the trial court designated Carla as a maintenance recipient and then included a requirement that she repay the majority of the monthly maintenance award to David James Keding. After a thorough review of the record,

the parties' arguments, and the applicable law, we agree with Carla that ordering a repayment of maintenance was error, necessitating reversal. Accordingly, we reverse and remand this matter for further proceedings.

The parties were married for sixteen years when David sought the dissolution of the marriage. It is apparent from the record that Carla was not employed at the time of the dissolution, while David owned a chiropractic business. The trial court entered a docket order on July 12, 2010, setting temporary maintenance and requiring David to continue to make payment on the parties' vehicles, all insurances, and Carla's rent and utilities.

The parties mediated their issues on December 10, 2010, and signed a mediation agreement, whereby Carla would receive David's 50% interest in a storage unit business as her complete share of the parties' marital property; beginning January 1, 2011, David would pay Carla maintenance in the amount of $2,000 per month for 12 months and then $1,500 for an additional 6 months, for a total of 18 months; and both parties would pay their own legal fees.

The signed mediation agreement was filed on January 25, 2011. David's counsel then filed a motion for a final hearing as additional issues had arisen since the parties had mediated the agreement. Specifically, after the mediation, the parties discovered that transfer of David's interest in the storage business was restricted by a buy/sell agreement entered into with his business partner, John Tubbs. Mr. Tubbs did not wish to have Carla as a business partner, resulting in him filing a lawsuit against Carla and David. Ultimately, this lawsuit

was dismissed by agreed order and on August 4, 2011, alerted the trial court *sub judice* of this dismissal.

A final hearing was set for April 18, 2011. During this time, Carla alleges that David reduced her monthly maintenance even though she could not obtain ownership of the storage unit business after mediation, and allegedly stopped payment of her health insurance without her knowledge or the trial court's permission. After multiple motions from the parties, the court entered a docket order on June 14, 2011, requiring David to abide by the status quo order entered by the court on July 13, 2010, setting out temporary maintenance and providing for Carla's insurance.

The payment of Carla's health insurance was reiterated by the court in yet another docket order on August 8, 2011. The parties entered joint stipulations and agreed to joint custody, timesharing, divided the marital property and agreed that the transfer of the storage unit business to Carla was equitable based on David retaining the marital residence and the chiropractic business. The parties agreed that Carla's attorney fee issue would be presented to the court at the final hearing based on the trial court's orders regarding this matter.[1]

On September 8, 2011, the trial court entered its judgment and order setting forth its findings that Carla was a maintenance candidate after sixteen years of marriage and imputed minimum wages to her. The court further found that the

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[1] The trial court instructed Carla's attorney to prepare an affidavit of attorney fees resulting from the litigation occurring after mediation.

transfer of the storage unit business would not provide her with sufficient income, rendering the amount of agreed upon maintenance in the mediation agreement fundamentally unfair. Thus, the trial court modified the award of maintenance to $1,500 per month until the business sold, generated a positive cash flow, or until the mortgage on the business was paid off in six years.[2]

Thereafter, the court ordered that Carla would repay to David all maintenance amounts she received beyond the amount originally agreed to be paid to her by David during the eighteen months set forth in the mediation agreement. The trial court stated that Carla would be responsible for her health insurance premiums after the entry of the decree through COBRA or her own policy and all expenses related thereto; however, during the pendency of this action, David was responsible because he should never have stopped payment on her policy.[3] Last,

[2] The court disregarded the portion of the mediation agreement dealing with maintenance in light of the parties' economic circumstances. KRS 403.180 permits the parties to enter into a separation agreement concerning such issues as maintenance, but requires that the court find the agreement to be unconscionable prior to modifying the agreed upon maintenance award. On remand, the trial court will have to address the parties' arguments concerning KRS 403.180.

[3] We note that Carla argues that COBRA is not available because David unilateral decision, to stop payments on the insurance, which was in violation of the court's order, resulting in her securing another policy with larger premiums because she was placed in a high risk policy. On remand, the trial court will have to assess this issue. We direct the court's attention to Kentucky Family Court Rules of Procedure and Practice ("FCRPP") 2(5) which states:

> (5) Status Quo Orders. At the initial court appearance, the court may enter a standing order on AOC-237, Status Quo Order, which may include the following:
> (a) Neither party shall, except as necessary to pay reasonable living expenses, incur unreasonable debt, sell, encumber, gift, bequeath or in any manner transfer, convey or dissipate any property, cash, stocks or other assets currently in their possession or in the control of another person, company, legal entity or family member without permission of the court or an agreed order signed by both parties or their attorneys.
> (b) Neither party shall allow the cancellation or lapse of any health, life, automobile, casualty or disability insurance currently covering themselves or a family member or change the named beneficiaries on such policies prior to receiving permission of the court or filing an agreed order signed by both parties or their attorneys.

the trial court ordered that each party would be responsible for their own attorney fees in light of the mediation agreement. It is from this order that Carla now appeals.

On appeal, Carla presents three arguments, namely, (1) the trial court abused its discretion by requiring a maintenance candidate to repay her maintenance award she was provided pursuant to KRS 403.200; (2) the trial court abused its discretion in refusing to award attorney fees to Carla as permitted under KRS 403.220; and (3) the trial court abused its discretion in its refusal to require David to provide payment for Carla's health insurance post-decree after David's unilateral actions made Carla's attainment of health insurance a financial impossibility.

Ultimately, we are in agreement with Carla that the court erred in requiring her to repay an award of maintenance, necessitating reversal. We decline to address Carla's argument on attorney fees because we are remanding for the court to reconsider the maintenance award and any payment of attorney fees requires, by statute, that the assets of the parties be considered. Thus, once the trial court decides the issues surrounding the maintenance award then it must reconsider the attorney fee award[4] on proper motion. Carla's argument concerning the health insurance cost is yet another financial consideration that the trial court must make when dividing the parties assets and awarding maintenance. And, again, when the

[4] We do note that Carla would qualify for an award of attorney fees per KRS 403.220 based on the imbalance in the financial resources of the parties; however, such an award is left to the sound discretion of the trial court. *See Lampton v. Lampton*, 721 S.W.2d 736, 739 (Ky.App. 1986) and *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

trial court decides the issues surrounding the maintenance award then it can reconsider the insurance issues on proper motion. On remand, the trial court will have an opportunity to address these issues. We now turn to the dispositive issue on appeal, the court ordering Carla to repay maintenance.

In maintenance awards, the trial court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard. *See Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). However, the trial court's conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky.App. 2009).

KRS 403.200(1)[5] provides that a court may grant maintenance only if it finds the spouse seeking it: (a) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) is unable to support himself through appropriate employment.

An award of maintenance is appropriate when a party is not able to support himself or herself in accord with the standard of living enjoyed during the marriage and the property awarded upon dissolution of marriage is insufficient to provide for his reasonable needs. *Russell v. Russell,* 878 S.W.2d 24, 26 (Ky.App 1994).

Once the trial court has decided that maintenance is appropriate, it must then consider all relevant factors in determining the amount and duration of

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[5] The entirety of the statute states:

> (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
> (c) The standard of living established during the marriage;
> (d) The duration of the marriage;
> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.
> KRS 403.200.

maintenance pursuant to KRS 403.200(2). Such factors include the spouse's financial resources, the time needed to obtain sufficient education or training, the standard of living during the marriage, the duration of the marriage, the age and condition of the spouse seeking maintenance, as well as the ability of the paying spouse to meet his or her needs.

Sub judice, the trial court found that maintenance was appropriate to avoid Carla becoming indigent after sixteen years of marriage. The court found that the amount of maintenance of $1,500 per month was not unreasonable given the length of the marriage, the contributions of Carla, the disparity of income and property division. The court found that after the agreed upon eighteen months of maintenance, that David should continue this maintenance payment to Carla until the storage unit business was sold,[6] or until it generated positive cash flow,[7] or until the mortgage was paid off on the business[8]; however, this was more maintenance than the parties had agreed to and thus, the court ordered Carla to pay back this "equitable maintenance."

By requiring Carla to pay back the maintenance award post the agreed upon eighteen months, the court effectively converted an award of maintenance

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[6] We note that the order does not specifically address the situation which may occur if the business were to sell prior to the expiration of the original award of eighteen months of maintenance.

[7] We believe for the sake of clarity that such a condition should not be imposed without specific conditions attached thereto, such as after tax net income, duration for positive cash flow, etc.

[8] Carla was then instructed to repay the amount paid by David $1,000 per month until paid in full, no later than six years from the date of the order as the mortgage should be paid in full by then.

into a loan. Such was not envisioned by KRS 403.200. Simply stated, once the court found that an award of maintenance was appropriate based on the statutory factors, the court must set the duration for maintenance in light of KRS 403.200 and may not convert said maintenance into a loan to be repaid by the receiving party. By converting the maintenance into a loan, the trial court erred.

Accordingly, we reverse and remand the trial court's judgment and orders in their entirety for further proceedings.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

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